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Supreme Court, U.S.
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No. 00-1631

IN THE

Supreme Court of the United States

KINAM GOLD INC., a Delaware Corporation, formerly known as Amax Gold, Inc.; AMAX GOLD, INC. SEPARATION PLAN FOR KEY EMPLOYEES; AMAX GOLD, INC. BENEFITS COMMITTEE; KINROSS GOLD CORPORATION BENEFITS COMMITTEE; and KINROSS GOLD CORPORATION,

Petitioners,

v.

MARK LETTES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPY BRIEF

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PARTIES TO THE PROCEEDING

Respondent adds two parties. (Resp. at i.) Cyprus Amax Minerals Co. and Phelps Dodge Corporation are not "parties to the proceeding in the court whose judgment is sought to be reviewed." Sup. Ct. R. 14.1(b).

STATEMENT PURSUANT TO RULE 29.6

Petitioners refer the Court to page ii of the Petition.

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STATEMENT OF THE CASE

Respondent dwells on the facts of his request for severance. (Resp. at 2-3.) These facts are not relevant to the Petition for Certiorari. The Tenth Circuit Court of Appeals issued no ruling on whether Respondent was entitled to benefits under the AGI Plan. The Tenth Circuit ruled only that the AGI Plan is not a "plan" under ERISA. The court then remanded the case to the District Court with instructions to remand it to state court. In the current posture, the state courts will determine whether Respondent is entitled to benefits under the AGI Plan.

FURTHER REASONS FOR GRANTING THE WRIT

Respondent argues that the instant case does not present an issue of public importance. (Resp. at 4, 7-8.) The issue here is one that will arise again in the future, unlike the issue presented in *Rice v. Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955). The AGI Plan is not unique; it is a common severance arrangement for key employees. The federal courts have considered similar plans, and may be expected to consider similar plans in the future. *See, e.g.*, *Bogue v. AMPEX Corp.*, 976 F.2d 1319, 1322 (9th Cir. 1992); *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72 (2d Cir. 1996); *Collins v. Ralston Purina Co.*, 147 F.3d 592 (7th Cir. 1998). Thus, the case involves an important federal question and requires this Court's action.

Respondent downplays the importance of this case by emphasizing that the decision below is not published. (Resp. at 3, 4.) The Court of Appeals cannot insulate its decisions from this Court's review by choosing not to publish those decisions. *See* 28 U.S.C. § 1254 (1994) ("*cases* in the

courts of appeals may be reviewed by the Supreme Court") (emphasis added). This Court does not reject Petitions merely because they concern unpublished opinions. *See, e.g., Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001) (reviewing unpublished decision reported at 205 F.3d 1351 (9th Cir. 1999)). Moreover, even unpublished opinions have both precedential and persuasive value. *See Anastasoff v. United States*, 223 F.3d 898, 903-905 (8th Cir.), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000); 10th Cir. R. 36.3(B)(1).

I.

THE COURT SHOULD RESOLVE THE FEDERAL QUESTION CONCERNING ERISA'S COVERAGE OF EMPLOYER-SPONSORED BENEFIT PLANS.

A. ERISA Covers Deferred Compensation Plans for Key Employees.

Respondent contends that ERISA "limit[s] its coverage for unfunded 'employee benefit plans,' . . . particularly plans that are 'maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.' " (Resp. at 5 [citations omitted].) ERISA does not subject unfunded deferred compensation plans to its participation and vesting, funding, and fiduciary rules, but there is no question that such arrangements are "plans" under ERISA. *See* 29 U.S.C. § 1051(2) (1994 & Supp. 1999). Respondent's citation to 29 U.S.C. § 1003(b)(5) (1994 & Supp. 1999) does not further his argument because that provision refers to a different kind of plan, unfunded excess benefit plans as defined in § 1002(36). Respondent has never argued that the AGI Plan is an excess benefit plan under § 1002(36).

Respondent further contends that the Tenth Circuit's decision in this case does not contradict authoritative interpretations of ERISA because ERISA does not clearly define "plan." (Resp. at 5.) Respondent completely disregards Petitioners' references to administrative and judicial interpretations of "plan" under ERISA. (Pet. at 10-13.)

B. The Tenth Circuit's Ruling Misapplies *Fort Halifax.*

Respondent argues that the Tenth Circuit's decision only rejected the District Court's exclusive reliance on the AGI Plan administrator's discretion in determining eligibility for benefits. (Resp. at 6-7.) (*See* App. 36a-38a [District Court opinion, citing *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254, 258 (8th Cir. 1994); *Fontenot v. NL Industries, Inc.*, 953 F.2d 960, 962-63 (5th Cir. 1992); *James v. Fleet/ Norstar Financial Group, Inc.*, 992 F.2d 463, 468 (2d Cir. 1993); *Bogue*, 976 F.2d at 1323; *Collins*, 147 F.3d at 597].) *See also Pane v. RCA Corp.*, 667 F. Supp. 168, 170 (D.N.J. 1987) (identifying ERISA "plan" by reference to whether "the circumstances of each employee's termination have to be analyzed in light of certain criteria"), *aff'd*, 868 F.2d 631 (3d Cir. 1989).

Even Respondent acknowledges, however, that the Tenth Circuit went beyond rejecting the District Court's reasoning and entered its own ruling on the merits. The Tenth Circuit ruled that the AGI Plan is not an ERISA "plan" because it "was unfunded, contingent on a one-time event that might never happen, and expressly limited to a narrow time period. It involved only nine specific employees and the benefit was to be paid in a lump sum based on a mathematical formula." (App. at 10a; Resp. at 7.) As argued in the Petition, the Tenth Circuit based this determination on this Court's language in

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11-12 (1987). The Tenth Circuit took this language out of its context of state legislation, and created a complexity threshold requirement for employer-sponsored ERISA "plans." (Pet. at 13-18.)

Courts and the Department of Labor have interpreted ERISA to create employee protections for virtually any discernible employer-sponsored arrangement providing employees with benefits of the kinds enumerated in the statute. (*See* Pet. at 10-12.) The AGI Plan provides deferred income to a specific set of key employees, pursuant to a stated claim and appeal procedure, all subject to an Administrator's discretionary authority. (Pet. at 12.) Therefore, as the statute is routinely interpreted, ERISA would cover the AGI Plan and other similar plans, without considering whether benefits were paid in a lump-sum. (*See id.*) *Fort Halifax* did not alter this interpretation of ERISA coverage.

II.

THE COURT SHOULD RESOLVE CONFLICTS AMONG THE CIRCUIT COURTS CONCERNING THE APPLICATION OF *FORT HALIFAX* TO EMPLOYER-SPONSORED PLANS.

A. The Circuit Courts Apply Diverse Standards for ERISA Coverage of Employer-Sponsored Plans.

Respondent, without explanation, contends that the Circuit Courts have had no difficulty in applying *Fort Halifax*. As demonstrated in the Petition, the Circuit Courts in fact have developed wildly varying standards to apply to benefits plans. (Pet. at 19-22.) Some Circuit Courts

assert the *Fort Halifax* language as the only necessary condition for an ERISA "plan." *Young v. Washington Gas Light Co.*, 206 F.3d 1200, 1203 (D.C. Cir. 2000). Other Circuit Courts assert a variety of factors which bear varying degrees of resemblance to the language of *Fort Halifax*. *See New England Mut. Life Ins. Co. v. Baig*, 166 F.3d 1, 4 (1st Cir. 1999); *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 76 (2d Cir. 1996). Some Circuit Courts interpret *Fort Halifax* to require only individualized decision making. *Bogue v. AMPEX Corp.*, 976 F.2d 1319, 1323 (9th Cir. 1992); *Pane v. RCA Corp.*, 667 F. Supp. 168, 170 (D.N.J. 1987), *aff'd*, 868 F.2d 631 (3d Cir. 1989); *Cvelbar v. CBI Illinois Inc.*, 106 F.3d 1368, 1374-75 (7th Cir. 1997). Other Circuit Courts interpolate the *Fort Halifax* language into the earlier *Dillingham* standards. *Johnston v. Paul Revere Life Ins. Co.*, 241 F.3d 623, 629 (8th Cir. 2001); *Williams v. Wright*, 927 F.2d 1540, 1544 (11th Cir. 1991). The Tenth Circuit adds the *Fort Halifax* language to the *Dillingham* standards. *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1178 (10th Cir. 1997). Respondent does not explain how courts might harmonize these various standards.

B. The Circuit Courts Conflict Over the Federal Issue of ERISA Coverage for Employer-Sponsored Plans Similar to the AGI Plan.

Respondent posits that the decision of the Tenth Circuit in this case differs from the decisions of other Circuit Courts interpreting similar benefit plans only because of the details of those plans. Respondent mischaracterizes the important factors considered by the courts in those cases.

In discussing *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72 (2d Cir. 1996), Respondent focuses on "other

benefits" the employees might receive and the "effective period" of the plan. (Resp. at 10.) In determining that the plan was an ERISA "plan," the Second Circuit in *Schonholz* did not address "other benefits" employees might receive under the plan. While the court did consider the "effective period," it did so only after noting that two of three possible factors already indicated that ERISA would apply; the plan "necessitated both managerial discretion and a separate analysis of each employee in light of certain criteria." *Schonholz*, 87 F.3d at 76. The AGI Plan similarly requires managerial discretion and a separate analysis of each employee.

In discussing *Collins v. Ralston Purina Co.*, 147 F.3d 592 (7th Cir. 1998), Respondent focuses on the number of employees affected and the availability of COBRA benefits. (Resp. at 11.) The Seventh Circuit in *Collins* did not concern itself with the availability of COBRA benefits. Instead, the court found the determinative factor was that the plan required the exercise of discretion to determine whether the managers experienced substantial reductions in their job duties. The court specifically noted: "The important point is not the exact number [of agreements similar to the plaintiff's] but the fact that [the company] executed agreements (of whatever number) requiring it to make nonclerical 'judgment calls.' " *Collins*, 147 F.3d at 597. Similarly, the AGI Plan requires nonclerical judgment calls about comparable employment.

In discussing *Bogue v. AMPEX Corp.*, 976 F.2d 1319 (9th Cir. 1992), Respondent focuses on the fact that "the seller-employer 'remained obligated' to make those [individualized] decisions after any takeover." (Resp. at 11.) There is no indication that the Seventh Circuit in *Bogue* was

concerned with the identity of the plan administrator. Instead, the court was concerned with the plan administrator's use of discretion:

> In this case, Allied-Signal, the program's administrator, remained obligated to decide whether a complaining employee's job was "substantially equivalent" to his pre-acquisition job. Although the program, like the plan[ ] in *Fort Halifax* . . . was triggered by a single event, that event would occur more than once, at a different time for each employee. There was no way to carry out that obligation with the unthinking, one-time, nondiscretionary application of the plan administrator[ ] in *Fort Halifax* . . . . Although its application was uncertain, its term was short, and the number of its participants was small, the program's administration required a case-by-case, discretionary application of its terms.

Bogue, 976 F.2d at 1323. The decision in *Bogue* flatly contradicts the Tenth Circuit's ruling in this case. The AGI Plan is "contingent," "limited to a narrow time period," and "involve[s] only nine specific employees" (App. at 10a), but it requires the administrator to make "a case-by-case, discretionary application of its terms," and it would pay benefits at different times depending on the employee's date of Separation from Service. (Plan at L 6, L 11-12; Amendment at L 25-26.) Consequently, under *Bogue*, the AGI Plan would be an ERISA "plan."

C. The Circuit Courts' Conflicts Subject ERISA Plans to Divergent State and Federal Law.

Respondent argues that there is no fear of a "patchwork scheme of regulation" because, in the absence of an ERISA "plan," ERISA does not apply. (Resp. at 12.) Unless this Court grants the Petition, different Circuit Courts will continue to apply *Fort Halifax* differently. Some Circuit Courts will find an employee benefit program to be an ERISA "plan," while other courts find similar programs not to be ERISA "plans." Under these circumstances, employers engaged in interstate commerce cannot create a uniform administrative scheme to provide benefits. This result is contrary to Congress' goals for ERISA. (*See* Pet. at 25.)

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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